Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ERNEST BROWN,

Petitioner,

v.

WILLIAM M. PLAUT,
ASSOCIATE DIRECTOR FOR INSTITUTIONS
OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 11, 1998

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18 pp

QUESTIONS PRESENTED

1. Under *Sandin v. Conner*, 515 U.S. 472, 487 (1995), do prison rules create a constitutionally-protected liberty interest against administrative segregation if this confinement is (a) significantly more restrictive than housing in the general prison population; and (b) atypical, because neither it nor any similarly-restrictive confinement may be imposed on a discretionary basis?

2. In prison administrative segregation cases involving a constitutionally-protected liberty interest, does determination of whether *Wolff v. McDonnell*, 418 U.S. 539 (1974), or *Hewitt v. Helms*, 459 U.S. 460 (1983), prescribes the process due depend on whether (1) the reason for the segregation is a finding of "serious misbehavior"; and (2) segregation imposed for this reason "can postpone . . . the actual date of parole," though "it is not certain to do so"? *Wolff*, 418 U.S. at 571 n. 19 and 561.

PARTIES BELOW

The parties to the proceeding in the U.S. Court of Appeals for the District of Columbia Circuit were Ernest Brown, plaintiff-appellant, and Bernard L. Braxton, D. Pullen, William Schroeder, Arralean Ellis, and the District of Columbia, defendants-appellees.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit appears in the appendix ("App.") at 1a-19a and is reported at 131 F.3d 163. It is the only reported opinion. The district court's unreported opinion dismissing petitioner's first amended complaint appears at App. 24a-29a. The district court's unreported opinion dismissing petitioner's second amended complaint appears at App. 22a-23a.

JURISDICTION

The judgment of the court of appeals was entered December 16, 1997. The court's order denying rehearing was entered on February 9, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The applicable provisions, set forth in the appendix, App. 34a-40a, are the Due Process Clause, U.S. Const. amend. V; 42 U.S.C. §1983; and numerous legislatively-approved District of Columbia prison rules published in title 28, District of Columbia Municipal Regulations (DCMR).

STATEMENT OF THE CASE

Petitioner Brown, a medium-custody District of Columbia prisoner, filed in the district court a suit for damages under 42 U.S.C. § 1983. The court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). Brown claims that prison officials violated his Fifth Amendment due process rights provided by *Wolff v. McDonnell*, 418 U.S. 539 (1974), when they transferred him from a medium custody dormitory facility in

Lorton, Virginia to restrictive confinement in administrative segregation in a cell of the Lorton Maximum Security Facility.

The district court dismissed Brown's due process claim, holding that, under *Sandin v. Conner*, 515 U.S. 472 (1995), the applicable prison rules do not create a constitutionally-protected liberty interest against confinement in administrative segregation.

The court of appeals declined to decide the *Sandin* issue. It said that *Sandin* was "not clear," that its application to the facts "presents a number of difficulties" and "unsettled questions," that the analysis in case law from the Second and Ninth Circuits has not been adopted by the Fifth Circuit, and that the Seventh Circuit has said that it would "welcome clarification" by the Supreme Court. App. 12a-13a, *quoting Wagner v. Hanks*, 128 F.3d 1173, 1176 (7th Cir. 1997).

Instead of deciding the *Sandin* issue, the court of appeals held that *Hewitt v. Helms*, 459 U.S. 460 (1983), not *Wolff*, prescribed the process due and that the district court should decide first whether prison officials had complied with *Hewitt*. If the answer was no, then the district court should decide the *Sandin* issue anew, "in light of the questions identified in [the appellate court's] opinion." App. 18a-19a.

Facts

The facts giving rise to Brown's due process claim are set forth in detail in paragraphs 12-22 of his second amended complaint. App. 46a-51a. Brown claims two violations of *Wolff v. McDonnell*, 418 U.S. 539 (1974).

First, Brown claims that, while the written decision placing him in administrative segregation said he had assaulted an officer, the decision identified no evidence to support this

conclusion. App. 48a. Instead, the decision said only that there had been an "alleged incident involving correctional staff." *Id.* This failure to provide written evidentiary findings violated *Wolff.* 418 U.S. 563-564 and 571, n. 19 (1974) (where specific requirements apply to "a major change in the conditions of confinement . . . normally imposed only when it is claimed and proved that there has been a major act of misconduct," prison decisions imposing the change must be supported by written evidentiary findings).

Brown also claims that prison officials afforded him no advance notice that he was accused of assaulting an officer. App. 46a-48a. Brown went to the prison hearing on notice that he was accused of the minor offense of threatening conduct, for words he allegedly had uttered; but, instead, he was found guilty of the major offense of assaulting an officer. This, too, was a clear violation of *Wolff.* 418 U.S. at 563 (requiring "advance written notice of the claimed violation").

Like the state provisions in *Wolff,* the Lorton prison rules prohibit imposition of administrative segregation in the absence of specified substantive findings. 28 DCMR § 521.4 (1987). In Brown's case, the rules required a finding that he posed "a clear and present threat to the safety of others." § 521.4(b). Brown claims that this substantive requirement creates a constitutionally-protected liberty interest against confinement in administrative segregation since (1) this confinement is far more restrictive than housing in the general population of a Lorton medium security dormitory facility, App. 49a-50a;[1] (2) the prison rules prohibit officials from

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[1] The court of appeals already had so found, in a prior case. *Crosby-Bey v. District of Columbia,* 786 F.2d 1182, 1183 (D.C. Cir. 1986) ("[b]oth disciplinary segregation and administrative segregation involve a substantial loss of liberty for the prisoner").

imposing any similarly restrictive confinement on a discretionary basis. Under the rules, any restrictive confinement in a maximum security cell is either disciplinary or administrative segregation. §§ 505.2, 521.3. This segregation may not be imposed unless a specific substantive standard is met.[2]

Brown claims that administrative segregation for assaulting an officer is likely to adversely affect parole consideration, and that in fact the segregation and assault finding substantially motivated his subsequent denial of parole. App. 50a-51a.

District Court Decision

The district court dismissed Brown's due process claim based on a single conclusion of law--the court's view that "given the standard established in" *Sandin v. Conner*, 115 S. Ct. 2293 (1995), the Lorton rules "do[] not create a liberty interest for the purposes of ensuring an inmate due process protection in instances of administrative segregation." App. 14, 35.

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[2] Involuntary protective custody may be imposed only where "factual information" shows a "clear and present threat to the resident's safety." §§ 526.1 and 520.4. Prisoners in voluntary protective custody have the right to immediate release on demand. § 521.12. Other types of administrative segregation may be imposed only if factual information establishes one of two other circumstances ("definite escape risk" or "clear and present danger to the safety of others"). §§ 520.2, 520.3. Disciplinary segregation may be imposed only if factual information demonstrates that a prisoner has committed a specific disciplinary offense. § 500.

Court of Appeals Opinion

The court of appeals declined to decide the *Sandin* question. Instead, the court held that *Hewitt v. Helms*, 459 U.S. 460 (1983), not *Wolff v. McDonnell*, 418 U.S. 539 (1974), prescribed the process due. The court remanded the case for determination of whether *Hewitt*'s minimal requirements had been met. The court reasoned that *Wolff* applies only to segregation that is disciplinary "in nature," while *Hewitt* applies to all administrative segregation, unless a prisoner shows either (1) that the administrative segregation later "was treated for parole purposes as equivalent to a disciplinary finding," or (2) "that administrative segregation was so widely used as a substitute for punishment that it carried the same stigma as disciplinary segregation." App. 15a.

REASONS FOR GRANTING THE WRIT

This case presents the same *Sandin* issue as the companion case, *Neal v. District of Columbia*; the Court should resolve this unsettled question, on which the circuits are divided.

The court below correctly noted that the courts of appeals have divided on the issue presented here:

> Caselaw from the Second and Ninth Circuits suggests that whether a term in segregation amounts to an "atypical and significant" deprivation turns on its length and on a comparison of conditions in segregation and in the prison's general population. *See, e.g., Brooks v. DiFasi*, 112 F.3d 46, 48-49 (2d Cir. 1997); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996). Other courts have not adopted so structured an analysis; for instance, the Fifth Circuit has concluded that a term in administrative segregation was not

> "atypical and significant" without discussing conditions in the segregation unit or the length of the segregation at all. *See Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1690 (1996). Were we to follow the approach of the Second and Ninth Circuits, we would then need to decide whether the length and severity of the deprivation Brown experienced sufficed to render that deprivation "atypical and significant," a close and difficult question. *Compare Sealey v. Giltner*, 116 F.3d 47, 51-52 (2d Cir. 1997) (remanding for specific findings on conditions of confinement in the case of an inmate held in administrative segregation for six months) with *Mackey v. Dyke*, 111 F.3d 460, 463 (6th Cir.), *cert. denied*, 139 L. Ed. 2d 84, 118 S. Ct. 136 (1997) (finding that a six-month term in administrative segregation was not "atypical and significant," with no discussion of conditions in segregation).

App. 13a-14a.

The Court should resolve this conflict among the circuits by applying the analysis set forth in *Sandin*. There, the Court held that a prisoner in Hawaii did not have a constitutionally-protected liberty interest against confinement in disciplinary segregation because, under Hawaii law, disciplinary segregation was not an "atypical, significant deprivation" of liberty. 515 U.S. at 486. The Court based this holding on two findings.

First, disciplinary segregation in Hawaii "mirrored those conditions imposed upon inmates in administrative segregation and protective custody." *Id.* Second, under Hawaii law, imposition of administrative segregation or protective custody was "totally discretionary." *Id.* Thus, since disciplinary segregation in Hawaii prisons "did not exceed similar, totally discretionary confinement," *id.*, the

Hawaii regulations on disciplinary segregation were "not designed to confer rights on inmates." *Id.* at 482.[3]

The rule adopted in *Sandin* compares challenged confinement to conditions prevailing in the most restrictive type of confinement that prison officials lawfully may impose in exercise of unfettered discretion. Under the Hawaii regulations in *Sandin* the most restrictive but totally discretionary confinement that prison officials could impose was administrative segregation and protective custody. Therefore, conditions in administrative segregation and protective custody were the proper bases for comparison. Since disciplinary segregation in Hawaii "mirrored" and did not "exceed" to any significant degree the restrictiveness of administrative segregation and protective custody, the *Sandin* Court held that Hawaii regulations defining circumstances warranting disciplinary segregation created no liberty interest, because prison officials could impose the same degree of confinement, though under different names, through exercise of unfettered discretion. *Id.* at 486.

Sandin was a straightforward application of the holding and reasoning of *Meachum v. Fano*, 427 U.S. 215, 228 n.4 (1976) (no liberty interest against prison transfer where "no ... law stripped officials of the discretion to transfer prisoners ... 'for whatever reason or for no reason at all' "). 515 U.S. 478-

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[3] The *Sandin* holding was not based on comparison of the degree of confinement in disciplinary segregation to that in the general population in Hawaii prisons. Though the Court mentioned general population conditions, 515 U.S. 486 n.8, the Court's holding was that there could be no liberty interest against imposition of disciplinary segregation where this segregation "mirrored" and did not "exceed" to *any* significant degree "totally discretionary" administrative segregation and "totally discretionary" protective custody.

79. While following *Meachum*, *Sandin* expressly reaffirmed *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (state law created liberty interest against imposition of prison discipline revoking prison good time credits, where credits "were revocable *only* if the prisoner was guilty of serious misconduct") (emphasis added). 515 U.S. 477-78.[4]

The prison rules here are like the state statutes in *Wolff*, not the provisions in *Meachum* or *Sandin*. Unlike the Hawaii regulations in *Sandin*, the rules here do *not* allow Lorton officials to impose *either* disciplinary segregation, administrative segregation, *or* protective custody on a "totally discretionary" basis. Under the Lorton rules *none* of these types of restrictive confinement may be imposed unless a specific substantive standard is met.[5] In contrast to the finding in *Sandin* that Hawaii regulations did not confer rights on prisoners, the District of Columbia Court of Appeals consistently has held that the Lorton rules do confer rights on Lorton prisoners. *Abdullah v. Roach*, 668 A.2d 801 (D.C. 1995); *Vaughn v. United States*, 598 A.2d 425 (D.C. 1991). In *Abdullah*, moreover, the court expressly observed that the District of Columbia "may be reading *Sandin* too broadly." 668 A.2d at 809.

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[4] The facts and holding in *Sandin* were similar to those in *Abbott v. McCotter*, 13 F.3d 1439 (10th Cir. 1994), where, as in *Sandin*, restrictive confinement identical to that challenged could be imposed on a totally discretionary basis. The *Abbott* court, a year before *Sandin*, reached the same conclusion announced in *Sandin*--prison regulations cannot create a liberty interest against a particular kind of confinement where equally restrictive conditions can be imposed on a totally discretionary basis.

[5] See n. 2, *supra*.

Since Lorton officials may remove prisoners from the general prison population *only* where a specific substantive standard is met, the proper base of comparison under the *Sandin* rule--to determine whether the Lorton prison rules create liberty interests against administrative or disciplinary segregation--is the restrictiveness of confinement in the Lorton general population.[6] Under the *Sandin* rule the question here is whether administrative segregation "mirrors" and does not "exceed" conditions of confinement for the general prison population.[7]

At Lorton, confinement in disciplinary or administrative segregation clearly "exceeds" and does not "mirror" the restrictivness of conditions in the general prison population. *Crosby-Bey v. District of Columbia*, 786 F.2d 1182, 1183 (D.C. Cir. 1986) ("[b]oth disciplinary segregation and administrative segregation involve a substantial loss of liberty for the prisoner"). The complaint also pleads a significant deprivation of liberty. App. 49a-50a.

Several post-*Sandin* decisions support the validity of petitioner's due process claim. *Brooks v. DiFasi*, 112 F.3d 46 (2d Cir. 1997) (confinement exceeding totally discretionary

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[6] The court in *Abdullah*, 668 A.2d at 809, n. 13, noted this point.

[7] Even Lorton officials' discretion to house prisoners within the general population is not totally unfettered. Lorton prisoners have an enforceable right to proper custody classification to determine in *which* general population they should be housed--the minimum, medium, or maximum custody population. *Verrett v. Stempson*, 623 A.2d 120 (D.C. 1993).

confinement and imposing a significant hardship requires due process); *Miller v. Selsky*, 111 F.3d 7 (2d Cir. 1997) ("*Sandin* did not create blanket rule that disciplinary confinement may never implicate a liberty interest"); *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) (*Sandin* requires due process where there is a major difference between segregation and housing in the general population); *Whitford v. Boglino*, 63 F.3d 527 (7th Cir. 1995) ("*Sandin* implies that states may grant prisoners liberty interests in being in the general population ... if the conditions of confinement in segregation are significantly more restrictive that those in the general population"); *Thomas v. Newkirk*, 905 F. Supp. 580 (N.D. Ind. 1995) (denying motion to dismiss due process challenge to disciplinary segregation; under *Sandin*, prison regulations may create liberty interest against even a short period of disciplinary or administrative segregation; where "regulation proscrib[es] segregation absent specified predicates" whether segregation is atypical and significant hardship depends on "evidence as to the conditions of the various types of segregation [and] that of the general population"); *Lee v. Coughlin*, 902 F. Supp. 424 (S.D.N.Y. 1995) (awarding summary judgment and damages to prisoner held in lengthy administrative segregation on assault finding reached in violation of due process; under *Sandin*, regulations created liberty interest). Under these precedents, and a proper analysis of *Sandin*, the Lorton prison rules create a liberty interest against confinement in administrative segregation.

The lower court's holding that *Hewitt*, not *Wolff*, prescribes the process due is contrary to *Wolff* and also conflicts with *Sandin*.

In *Sandin* the Court rejected the argument that prison segregation requires constitutionally-prescribed procedures merely because the segregation is labeled disciplinary rather than administrative. 515 U.S. 486. The Court held that the

relevant concerns were the duration, degree, and tangible consequences of segregation, not the label or stigma attached to it.

The court of appeals erred in holding that that *Wolff* applies only to segregation that is disciplinary "in nature," while *Hewitt* applies to all administrative segregation, unless a prisoner shows either (1) that the administrative segregation later "was treated for parole purposes as equivalent to a disciplinary finding," or (2) "that administrative segregation was so widely used as a substitute for punishment that it carried the same stigma as disciplinary segregation." App. 15a. The court's first criterion is unusable, since the process to be afforded must be determined before it is known how the segregation later "was treated" by the parole board. The second criterion is inconsistent with *Sandin*, since it is based on the stigma of discipline alone.

Contrary to the opinion below, *Wolff*, applies whenever (1) the reason for prison segregation is a finding of "serious misbehavior"; and (2) segregation imposed for this reason "can postpone ... the actual date of parole," though "it is not certain to do so." *Wolff*, 418 U.S. at 571 n. 19 and 561.[8] The complaint pleads a finding of serious misbehavior, assault on an officer, with likely adverse effect on parole. App. 48a, 50a-51a. *Wolff* therefore applies.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] In *Sandin* the Court held that due process protections are not required solely because of a possible impact on parole consideration, if the "chance that a finding of misconduct will alter the balance is . . . too attenuated." 515 U.S. 487.

Respectfully submitted,

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A Opinion of the Court of Appeals Wald, J., December 16, 1997 (holding process due under *Hewitt*, not *Wolff*, applicable to lengthy restrictive segregation labeled administrative, though imposed for assault with foreseeable adverse effect on parole consideration; remanding for determination of compliance with *Hewitt* and whether prison rules create liberty interest) 1a

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 9, 1997 Decided December 16, 1997

No. 96-7027

ERNEST BROWN,
APPELLANT

v.

WILLIAM M. PLAUT, ASSOCIATE DIRECTOR FOR INSTITUTIONS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 93cv00672)

Daniel M. Schember argued the causes and filed the briefs for appellant. *Alake Johnson-Ford* entered an appearance.

Mary L. Wilson, Assistant Corporation Counsel, argued the cause for the District of Columbia, with whom *Jo Anne Robinson*, Interim Corporation Counsel at the time the brief was filed, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief.

Jonathan J. Frankel argued the cause for *amicus curiae* American Civil Liberties Union of the National Capital Area, with whom *Stephen H. Sachs* and *Arthur B. Spitzer* were on the brief.

Before: WALD, HENDERSON and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: This case and its companion *James Neal v. District of Columbia* were argued on the same day and before the same panel because they raise similar issues.

Ernest Brown ("Brown"), a former inmate of the District of Columbia's (the "District's") prison at Lorton, seeks damages from the District for placing him in administrative segregation, a form of custody for prisoners who present an escape risk or pose a danger to themselves or others, for ten months allegedly without due process.[1] The district court, citing *Sandin v. Conner*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), found that Brown had no liberty interest in remaining free of that deprivation, and dismissed his suit. On appeal, the District argues that we affirm on the ground cited by the district court, or on the alternative

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[1] William M. Plaut, whose name appears in the caption of this case as a defendant, is an official of the District of Columbia Department of Corrections. He is not named as a defendant in Brown's second amended complaint, which is the complaint that is at issue in this appeal; he was, however, named as a defendant in Brown's initial complaint. The defendants named in the present complaint include the District of Columbia and a number of other D.C. prison officials.

grounds that Brown should have brought this action as a habeas corpus petition or that Brown has received all the process that was due him.

The question of how to apply *Sandin* raises difficult and unsettled questions of constitutional law, which we find it unnecessary to reach. Instead, we remand to the district court to decide the narrow factual issues relating to whether Brown received all the process he was due.

I. BACKGROUND

On the morning of October 12, 1992, Ernest Brown, then an inmate at the Occoquan medium-security facility of the District's Lorton prison, got into an argument with Corporal Parks, a prison guard, about cigarettes.[2] In the course of this dispute, he threw an "unknown substance," allegedly urine and feces, at Parks, and told him "I'm still going to get you." A search of Brown's cell disclosed a crude weapon fashioned out of a sharpened plastic toothbrush. Parks prepared a Disciplinary Report charging Brown with two offenses, Bodily Injury (presumably for throwing the "unknown substance"), and Threatening Conduct (for saying he would "get" Parks); a copy of this report was given to Brown. The following day, Brown was notified that a hearing of the Adjustment Board (Lorton's disciplinary body) would occur on October 16 on the charge of Threatening Conduct and on a charge of Possession of Major Contraband (the weapon). On that same day, Brown was transferred from Occoquan to

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[2] Because we are considering an appeal from a motion by the District to dismiss or in the alternative for summary judgment, what follows is an account of the undisputed facts, construed in the light most favorable to Brown.

administrative segregation at Lorton's Maximum Security Facility.

The Adjustment Board hearing apparently never occurred. Instead, on October 15, Brown was brought before Lorton's Housing Board, a body charged with determining whether prisoners are to be placed in administrative segregation. Brown received no advance notice of this hearing, and there is nothing in the record to show what occurred at the hearing. The only evidence in the record on this issue is a Housing Board Action Sheet, which states that the reason for the hearing was "to determine appropriate housing for Resident Brown, Ernest ... who was placed in the Adjustment Unit as a result of a Disciplinary Report for Fighting on October 5, 1992 and for the alleged incident involving staff on October 12, 1992." The sheet lists Brown as stating: "I don't fear for my safety. I just want to be placed somewhere where I can have access to a Law Library." It states that the Board finds Brown "to be a threat to self and others due to the alleged incident involving correctional staff," and concludes by stating that "Resident Brown assaulted Cpl. Parks."

Brown remained in administrative segregation for a total of ten months. In the medium-security unit in which he had previously been confined, he had been able to go outdoors from 8 a.m. to dusk, was permitted to move about the dormitory and interact with other inmates at all hours of the day or night, and could participate in many prison programs. In the unit in which Brown spent the first four months of his administrative segregation, by contrast, he was in solitary confinement, and was allowed to leave his cell only to meet with visitors (while shackled, handcuffed, and belly-chained), and for two hours a week of exercise in a hallway. Brown spent the remainder of his administrative segregation in a unit in which he was in solitary confinement, but was allowed to leave his cell for two or three hours a day. At the end of this

ten-month period, Brown was apparently returned to his previous custody status.

Brown filed his initial complaint in this case in April, 1993, alleging due process, free exercise, and Eighth Amendment violations. After Brown had moved successfully for appointment of counsel and for leave to file an amended complaint, the District moved to dismiss, or in the alternative for summary judgment, as to all three of Brown's claims. The district court granted the District's motion as to Brown's due process claim, but denied it as to his other two claims. (These claims, which involved Brown's rights to dental care and to attend religious services, have since been settled.) As to Brown's due process claim, the district court found that, under *Sandin v. Conner*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), Brown did not have a liberty interest in remaining free of administrative segregation, because his confinement in administrative segregation did not amount to an "atypical and significant hardship." 515 U.S. at 484. Brown then sought to file a second amended complaint in order to re-plead the due process claim and to add a related claim under District of Columbia law; the district court granted Brown leave to do so, but immediately dismissed the due process claim. Brown now appeals this dismissal.

II. ANALYSIS

We first reject the District's contention that because success on Brown's due process claim would "necessarily imply" that the decision to place Brown in administrative segregation was invalid, Brown must bring his claim by way of habeas corpus. As to the merits of Brown's due process claim, we address first whether Brown had a liberty interest in

avoiding his term in administrative segregation, and then whether he received the process he was due.[3]

Our review is *de novo* because we are considering an appeal from a motion to dismiss or in the alternative for summary judgment. *National Taxpayers Union, Inc. v. United States*, 314 U.S. App. D.C. 377, 68 F.3d 1428, 1432 (D.C. Cir. 1995) (dismissal); *Tao v. Freeh*, 307 U.S. App. D.C. 185, 27 F.3d 635, 638 (D.C. Cir. 1994) (summary judgment).

A. *Should This Action Have been Brought in Habeas Corpus?*

The District argues that, if Brown prevails, this will "necessarily imply" that the District's decision to place him in administrative segregation was invalid, and claims that this means that, under *Preiser v. Rodriguez*, 411 U.S. 475, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973) and its progeny, Brown's action must be brought in habeas corpus, not through section 1983. We conclude that the District reads the *Preiser* line of

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[3] The District also makes several arguments directed at Brown's claim under D.C. law. Brown correctly points out, however, that the order from which he appeals dismissed only his due process claim, not his claim under D.C. law. The order specifically stated that Brown's due process claim is "separate" from his other claims and that "there is no just reason for delay of final judgment as to this claim," and directed the entry of final judgment as to that claim. The language of this order meets the standard of Federal Rule of Civil Procedure 54(b) for dismissal of fewer than all of the claims in a case, so that Brown's appeal is properly before us. But, because Brown's D.C. law claim was never dismissed by the district court, it is not at issue in this appeal.

cases too broadly, and so decline to require that Brown's action be brought in habeas corpus.

In *Preiser*, the Supreme Court held that prisoners seeking the restoration of good-time credits which they claimed had been unconstitutionally withdrawn must do so through habeas corpus, not through section 1983. The Court observed that the prisoners' claims were "within the core of habeas corpus in attacking the very duration of their physical confinement itself." *Id.* at 487-88. Congress had required exhaustion of available state remedies as a prerequisite to habeas corpus relief, the Court explained, and it would "wholly frustrate" Congress's intent to permit this rule to be circumvented through the invocation of section 1983. *Id.* at 489-90. Preiser said that the same rule must apply to any challenge by a state prisoner to "the fact or duration of his confinement based, as here, upon the alleged unconstitutionality of state administrative action." *Id.* at 489. The *Preiser* Court set clear limits to this principle, however, expressly reaffirming its previous cases holding that a section 1983 action "is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody," *id.* at 499, because such actions are not at the "heart" of habeas corpus, *id.* at 498.

The Court has twice since clarified the reach of *Preiser*. In *Heck v. Humphrey*, 512 U.S. 477, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994), the Court considered a section 1983 action that sought money damages, rather than the specific relief at issue in *Preiser*. The plaintiff in *Heck* claimed that the unconstitutional acts of the defendants, who were state officials, had led to his arrest and conviction. The Court found that the plaintiff's action was analogous to a common-law action for malicious prosecution, and that the favorable-termination requirement of such actions therefore applied to the plaintiff's section 1983 action. *Heck* thus held that a

plaintiff who brings a claim under section 1983 that, if established, would "necessarily imply" that a criminal conviction or sentence was unlawful must demonstrate as an element of his claim that the conviction or sentence has been reversed, expunged, invalidated, or "called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 484-87. In *Edwards v. Balisok*, 137 L. Ed. 2d 906, 117 S. Ct. 1584 (1997), the Court made clear that Heck applies in some cases in which the underlying proceeding is not a criminal conviction or sentence, applying *Heck* to an action by a prisoner who asserted that a prison disciplinary proceeding that had deprived him of good-time credits had been invalid because, *inter alia*, the decisionmaker had not been impartial. *See* 117 S. Ct. at 1588-89.

We conclude, however, that Brown's suit, which challenges only his placement in administrative segregation, is not of the type to which it is appropriate to apply *Preiser* and its progeny.[4] The Court has never deviated from *Preiser*'s clear line between challenges to the fact or length of custody and challenges to the conditions of confinement. In *Edwards*, the

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[4] Brown does assert that his placement in administrative segregation may have affected his opportunities for parole, and thus the length of his confinement. It is true that Brown was denied parole in August, 1993, near or shortly after the end of his term in administrative segregation. But there is no evidence that the Parole Board considered the fact that Brown had been in administrative segregation in making its decision. The Parole Board's explanation said only that Brown's "adjustment has been poor[,] he has received two Class II DRs [disciplinary reports] and been charged with assault." Thus, the Board seems to have considered only the charges of misconduct against Brown, not their consequences.

Court was careful to respect the distinction drawn by *Preiser*, repeatedly characterizing the plaintiff's claim as one that would "necessarily imply the invalidity of the deprivation of his good-time credits" and therefore hasten his release. 117 S. Ct. at 1588. *Heck*, too, observed that the damages action in that case was in effect an attack on "'the fact or length of confinement.'" 512 U.S. at 482 (quoting *Preiser*, 411 U.S. at 494). The Court also did not question the plaintiff's invocation of section 1983 in *Sandin*, a case in which the underlying prison disciplinary proceeding affected only the plaintiff's conditions of confinement, not the duration of his sentence. *See* 515 U.S. at 487. *See also McCarthy v. Bronson*, 500 U.S. 136, 142, 114 L. Ed. 2d 194, 111 S. Ct. 1737 (1991) (drawing on *Preiser* 's distinction between challenges to the fact or length of custody and challenges to conditions of confinement in construing a statutory reference to the "conditions of confinement").[5]

Moreover, *Heck*'s rationale for its favorable-termination requirement is inapplicable to the facts of this case. Brown's action may not properly be analogized to a suit for malicious prosecution, as the decision he is challenging bears little resemblance to a judicial proceeding. Decisions to place

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[5] We recognize that one court of appeals has applied *Edwards* to a case in which the prisoner was subject only to disciplinary segregation, and not to loss of good time or any other change in the length of confinement. *See Stone-Bey v. Barnes*, 120 F.3d 718, 721 (7th Cir. 1997). We have found no other court of appeals decisions reaching this conclusion, and for the reasons set out in the text, we do not find its reasoning persuasive. *See also Clarke v. Stalder*, 121 F.3d 222, 226 (5th Cir. 1997) (*Preiser* and *Edwards* do not apply to actions in which "a favorable determination would not automatically entitle the prisoner to accelerated release").

inmates in administrative segregation are subject to greatly relaxed procedural requirements, *see Hewitt v. Helms*, 459 U.S. 460, 476, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983) ("An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation"), and the Court has recognized that they are often made fairly informally, on the basis of "subjective" and "intuitive" considerations, *see id.* at 474. Indeed, the administrative proceeding before the Housing Board entailed so little process that it would almost certainly be accorded no collateral estoppel effect. *See Nasem v. Brown*, 193 U.S. App. D.C. 416, 595 F.2d 801, 806-08 (D.C. Cir. 1979) (holding that an administrative proceeding in which the parties were not permitted to present live witness testimony or to cross-examine opposing witnesses should not be accorded collateral estoppel effect); 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4475, at 766 (1981). One of the Court's principal concerns in *Heck* was to limit collateral attacks on final judgments, *see* 512 U.S. at 484; but a proceeding that is incapable of giving rise to collateral estoppel, like that at issue in this case, hardly needs to be insulated from collateral attack. Finally, were Brown required to invoke habeas corpus to challenge his placement in administrative segregation, then the same rule would presumably apply to a myriad of prison officials' other administrative decisions affecting conditions of confinement, such as visitation, mail, shower, or library privileges. Habeas corpus might conceivably be available to bring challenges to such prison conditions, as the Court observed in Preiser, 411 U.S. at 499, but *requiring* the use of habeas corpus in such cases would extend *Preiser* far beyond the "core" of the writ that *Preiser* set out to protect. *Id.* at 487.

B. *Did Brown's Placement in Administrative Segregation Violate the Due Process Clause?*

Brown's placement in administrative segregation violated the Due Process Clause only if two conditions are met: Brown had a liberty interest in avoiding that term of segregation, and Brown did not receive the process he was due. The first of these questions raises difficult issues of constitutional law; the second, only narrow questions of fact. We therefore discuss the first question only to the extent necessary to explain why we do not decide it, and focus on the second.

1. *Did Brown Have a Liberty Interest?*

In *Sandin v. Conner*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), the Supreme Court reworked the framework for analyzing whether a prisoner has a state-created liberty interest in avoiding a particular deprivation. Before *Sandin*, this question was answered in much the same way as were questions about the existence of other liberty or property interests: if state laws or regulations contained language constraining the discretion of state officials, a liberty interest existed. *See, e.g., Hewitt*, 459 U.S. at 471-72. The *Sandin* Court found that this approach had given states "disincentives to ... codify prison management procedures" and led to the inappropriate "involvement of federal courts in the day-to-day management of prisons." 515 U.S. at 482. It therefore found that, although "States may under certain circumstances create liberty interests which are protected by the Due Process Clause," "these interests will generally be limited to freedom from restraint which ... imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484.

Applying *Sandin* to this case presents a number of difficulties. First, although *Sandin* clearly dictates that we compare the hardship experienced by the inmate to "the ordinary incidents of prison life," it is not clear which prison or part of a prison is to provide the standard of comparison. At various points in *Sandin*, the Court compared the prisoner's conditions in disciplinary segregation in Hawaii's Halawa Correctional Facility to "administrative segregation and protective custody" in that prison, to the "general population" of that prison, and to an undefined "range of confinement to be normally expected for one serving an indeterminate term of 30 years to life." *See Sandin*, 515 U.S. at 486-87.

The District suggests that, because the Attorney General has authority to transfer persons convicted in the District to any other prison nationwide, the appropriate baseline for our analysis is in fact the most rigorous prison in the nation.[6] The parties have not addressed, however, what may be a prerequisite to such an argument: evidence that such transfers are "totally discretionary," a point the *Sandin* Court found important in determining that it was appropriate to use conditions in administrative segregation and protective custody at Halawa as a baseline for comparison. *See* 515 U.S. at 486. At least one court has accepted a variant of this argument: the Seventh Circuit has found that, because inmates may be transferred within the Indiana prison system, the test of whether a deprivation is "atypical and significant" turns on a comparison with conditions in the state's most

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[6] The courts of the District of Columbia have construed sections 24-402 and 24-425 of the D.C. Code to permit inmates to be transferred to state as well as to federal institutions. *See Vaughn v. United States*, 579 A.2d 170, 173 (D.C. 1990).

rigorous prison. *Wagner v. Hanks*, 128 F.3d 1173, 1997 U.S. App. LEXIS 30906, 1997 WL 695375 (7th Cir. 1997).[7] The *Wagner* court also noted that, because Indiana can transfer its prisoners out of state, the proper standard of comparison may in fact be the most rigorous prison in the nation; it declined, however, to "decide whether logic should be pressed so far," and remanded the case for further fact-finding. *Id.* at 1176.

Even were we to reject the District's transfer argument, we would still face a number of unsettled questions about how to apply *Sandin* to this case. Caselaw from the Second and Ninth Circuits suggests that whether a term in segregation amounts to an "atypical and significant" deprivation turns on its length and on a comparison of conditions in segregation and in the prison's general population. *See, e.g., Brooks v. DiFasi*, 112 F.3d 46, 48-49 (2d Cir. 1997); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996). Other courts have not adopted so structured an analysis; for instance, the Fifth Circuit has concluded that a term in administrative segregation was not "atypical and significant" without discussing conditions in the segregation unit or the length of the segregation at all. *See Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1690 (1996). Were we to follow the

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[7] Judge Posner, the author of *Wagner*, also observed that under the panel's reading of *Sandin* "the right to litigate disciplinary confinements has become vanishingly small." 128 F.3d at 1175. He added that "this is a harsh result and perhaps the Court did not actually intend it," and acknowledged that while the Sandin Court cited cases involving prison transfers, "it did not draw the logical inference [that the baseline should be a state's most rigorous prison] and may not have intended to push its approach to its logical extreme...." *Id.* at 1176. And he further noted that "we would welcome clarification of the issue by the Court," *id.* at 1176.

approach of the Second and Ninth Circuits, we would then need to decide whether the length and severity of the deprivation Brown experienced sufficed to render that deprivation "atypical and significant," a close and difficult question. *Compare Sealey v. Giltner*, 116 F.3d 47, 51-52 (2d Cir. 1997) (remanding for specific findings on conditions of confinement in the case of an inmate held in administrative segregation for six months) with *Mackey v. Dyke*, 111 F.3d 460, 463 (6th Cir.), *cert. denied*, 139 L. Ed. 2d 84, 118 S. Ct. 136 (1997) (finding that a six-month term in administrative segregation was not "atypical and significant," with no discussion of conditions in segregation). And, finally, we would need to decide whether *Sandin*'s "atypical and significant" test merely supplements *Hewitt*'s test for the existence of a liberty interest, or supersedes it altogether. *See The Supreme Court, 1994 Term--Leading Cases*, 109 HARV. L. REV. 111, 147-50 (1995) (discussing this question). We do not think it necessary or even useful to resolve so many complex and fact-specific issues in the context of this case which it may be possible to decide on far narrower grounds.

2. Did Brown Receive the Process He Was Due?

By contrast to the liberty-interest question, whether Brown received the process he was due turns on a few simple questions of fact. The decision to place an inmate who has a liberty interest in administrative segregation is subject to limited procedural safeguards. "An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation.... So long as this occurs, and the decisionmaker reviews the charges and the then-available evidence against the prisoner, the Due Process Clause is satisfied." *Hewitt*, 459 U.S. at 476. This process may be conducted a reasonable time after the transfer, and may be done either orally or in writing;

periodic reviews are required after the initial transfer. *See id.* at 476-77 & n.9.

Brown contends that, because his placement in administrative confinement was based on an express finding that he had assaulted a correctional officer, it was essentially disciplinary in nature, so that he is entitled to the more extensive procedural protections applied to disciplinary hearings in *Wolff v. McDonnell*, 418 U.S. 539, 563-71, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974). Although *Wolff* itself involved both discipline and the loss of good time, we have applied *Wolff* in cases in which only discipline was at issue. *See Crosby-Bey v. District of Columbia*, 252 U.S. App. D.C. 20, 786 F.2d 1182, 1185 (D.C. Cir. 1986) (per curiam). But Brown has not established that his treatment was disciplinary in nature. Prison officials may appropriately place an inmate in administrative segregation if she "represents a threat to the institution's security." *Hewitt*, 459 U.S. at 474. The fact that prison officials have made a finding that the inmate has committed an assault, rather than operating on the charge or suspicion that she has done so or will do so, does not trigger *Wolff*.[8]

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[8] *Hewitt* explained the lower procedural protections associated with administrative segregation by noting that no stigma is attached to such segregation, and that it has no significant effect on an inmate's parole opportunities. *See Hewitt*, 459 U.S. at 473. If Brown had shown that the Housing Board's finding that he had assaulted a guard was treated for parole or other purposes as equivalent to a disciplinary finding to that effect, or that administrative segregation was so widely used as a substitute for punishment that it carried the same stigma as disciplinary segregation, this might indicate that more extensive procedural protections were warranted. He has made no such showing.

We therefore conclude that only the procedures required in *Hewitt*--"some notice," and an opportunity for the inmate to present his views, 459 U.S. at 476--apply to this case.[9] *Hewitt*'s requirements are not elaborate, but they are real, and must be strictly complied with. The present record raises two questions as to whether Brown had fair notice of the purpose and implications of the Housing Board hearing.

Brown was initially told that he would receive a disciplinary hearing on October 16 on charges of Threatening Conduct and Possession of Major Contraband. Then, on October 15, he was brought before the Housing Board. It is not clear whether Brown was told that this hearing would be his only opportunity to respond to the charges against him. With certain exceptions, D.C. regulations prohibit inmates from being held in administrative segregation for more than three days without a hearing before the Housing Board. D.C.

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[9] We do not agree with Brown's further contention that *Hewitt* requires that an inmate receive *advance* notice of the charges against him. Advance notice is certainly valuable, and prison officials should provide it to inmates where possible; but *Hewitt* calls only for "some notice."

The applicable regulations require that inmates receive written notice three days in advance of a housing hearing, D.C. Mun. Reg. tit. 28, § 523.1 (1987), a requirement that prison officials apparently did not comply with here. If the District did violate this requirement, that would not amount to a violation of the Due Process Clause. State law supplies only the substance of a liberty interest; federal constitutional law governs the procedures that are required when it is withdrawn. *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (en banc).

Mun. Regs. tit. 28, §§ 521.7, 531.10 (1987). Brown might thus have assumed that the Housing Board hearing was only intended to consider his temporary placement in administrative segregation pending the Adjustment Board's decision, and that he would have an opportunity to defend himself on any charges at the Adjustment Board hearing on the following day. On remand, the district court should determine whether Brown made this mistaken assumption, and if so whether it was reasonable for him to do so in light of what he was told about the purpose of the Housing Board hearing.

It is also not clear whether Brown knew that the Housing Board hearing was intended to address charges that he had assaulted a correctional officer. Brown had only been notified of an Adjustment Board hearing on charges of Threatening Conduct and Possession of Major Contraband. He had previously received a disciplinary report charging him with Bodily Injury; the fact that this charge was apparently not to be addressed at the Adjustment Board hearing could have reasonably led him to conclude that it had been dropped.[10] Nor does the Housing Board Action Sheet that appears in the record provide any evidence as to whether Brown was told at the hearing that the Board would consider whether he had committed an assault. It records Brown only as saying that he does not fear for his safety and that he wants to have access to a law library, words that might suggest Brown thought that the hearing was about whether he himself was threatened and wished to be placed in voluntary protective custody.[11]

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[10] Moreover, the D.C. regulations list Bodily Injury as a Class II offense, but Assault as a more serious Class I offense. D.C. Mun. Regs. tit. 28, §§ 502.4, 503.2 (1987).

[11] The sheet also states that Brown "has signed Non-Animosity and Waiver of Protective Custody forms"; the

If Brown was not provided an accurate picture of what was at stake in the hearing, then he was not given his due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, 94 L. Ed. 865, 70 S. Ct. 652 (1950); *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14-15, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978). On the other hand, if he was advised of the charges that would be considered against him and given "an opportunity to present his views," then he was given all the process he was due. *Hewitt*, 459 U.S. at 476. Because there is no record as to what occurred at the Housing Board hearing, we find it necessary to remand to the district court for further development of the facts surrounding this hearing.

III. CONCLUSION

In sum, we find that *Preiser*'s distinction between challenges to the conditions of confinement and challenges to its fact or duration means that Brown's complaint was properly brought under section 1983, and need not have been brought as a habeas corpus petition. As to whether Brown's rights under the Due Process Clause were violated, we express no opinion at this time as to whether Brown had a liberty interest in remaining free of administrative segregation. Instead, we remand this case to the district court to decide, first, assuming that Brown had a liberty interest in avoiding administrative segregation, whether he received all the process that he was due under *Hewitt*. If he did, that will be the end of the matter. If he did not receive any such process, the district court may proceed to consider whether a liberty

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meaning of this is unclear, but it may again be a reference to voluntary protective custody. (Brown denies that he signed the latter form.)

interest existed, in light of the questions identified in this opinion.

We therefore vacate the decision of the district court, and remand for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANDATE
Pursuant to the provisions of
Fed. R. App. Pro. 41(a)
2/19/98
BY: /s/, Deputy Clerk

No. 96-7027 **September Term, 1997**

United States Court of Appeals
For the District of Columbia Circuit
FILED DEC 16 1997

Ernest Brown,

Appellant

v.

William M. Plaut, Associate Director for Institutions of the District of Columbia Department of Corrections, et al.,

Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 93cv00672)

Before: WALD, HENDERSON and GARLAND, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in this cause is hereby vacated and the case is remanded, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Deputy Clerk

Date: December 16, 1997

Opinion for the Court filed by Circuit Judge Wald.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERNEST BROWN, Plaintiff,	)	
v.	)	Civ. A. No. 93-672 (RCL)
DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

FILED
JAN 18 1996
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

On consideration of plaintiff's unopposed supplemental motion for leave to file his second amended complaint, it is this 18th day of January, 1996

ORDERED, that plaintiff's motion is granted. Plaintiff's second amended complaint is accepted for filing. And it is

FURTHER ORDERED, that for the reasons stated in the Memorandum and Order entered October 13, 1995 the portion of plaintiff's complaint alleging that he was denied due

process incident to his October 1992 transfer to the District of Columbia's Maximum Security Facility at Lorton, Virginia is dismissed for failure to state a claim. Plaintiff's due process claim is separate from his other federal claims, there is no just reason for delay of final judgment as to this claim, and the Court hereby enters final judgment dismissing it.

/s/
Royce C. Lamberth
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
OCT 13 1995
Clerk, U.S. District Court
District of Columbia

ERNEST BROWN, Plaintiff,	)	
v.	)	Civil Action No. 93-672 (RCL)
DISTRICT OF COLUMBIA, *et al.*, Defendants.	)	

MEMORANDUM AND ORDER

Before this court is the motion by defendants District of Columbia, Bernard Braxton, Donald Pullen, John Lattimore, William Schroeder, Dele Ominijo, John Hamilton, Noel Tait and Arrelean Ellis to dismiss the amended complaint or, in the alternative, for summary judgment. Also before this court is the motion by the plaintiff for partial summary judgment. Plaintiff Ernest Brown brought this action under 42 U.S.C. § 1983 claiming that his First, Fifth and Eighth Amendment rights were violated.

1. Plaintiff's Due Process Claim

Plaintiff claims that defendants denied him due process with respect to certain liberties he was granted by the Lorton Regulations and Administration Act (L.R.A.A.).

Brown was an inmate at the Occoquan Facility when he was brought before the Housing Board for disciplinary charges without receiving proper notice as required by the L.R.A.A. As a result of the hearing Brown was placed in administrative segregation where he did not receive monthly status reviews as required by the L.R.A.A. In addition, he was transferred to a maximum security facility and held in administrative segregation for an indefinite period of time. In his due process claim, he alleged that the L.R.A.A. granted him a liberty interest, and defendants' actions in holding a hearing without giving him adequate notice, placing him in administrative segregation, refusing him an adjustment hearing and transferring him to a maximum security facility violated his due process rights.

There are two origins for liberty interest which invoke due process protection, the Due Process Clause itself and state created liberty interests. Hewitt v. Helms, 459 U.S. 460, 466 (1983); Meachum v. Fano, 427 U.S. 215, 223-227 (1976). It is well settled that the Due Process Clause itself does not cover prisoners who are placed in administrative segregation or transferred to less desirable facilities within a state's correctional system. Hewitt v. Helms, 459 U.S. at 466-468; Meachum v. Fano, 427 U.S. at 224-225. However, in certain limited situations, states may create liberty interests which trigger due process protection.

The Supreme Court recently restricted a state's ability to create liberty interests worthy of due process protection in Sandin v. Conner, -- U.S. --, 115 S. Ct. 2293 (1995). According to the Court, states may create liberty interests

which invoke due process protection, but these interests "will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection of the Due Process Clause of its own force ... nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." -- U.S. at --, 115 S. Ct. at 2300.

Similar to the plaintiff's claim in Sandin, Brown's placement in administrative segregation and transfer to another facility did not deprive him of a liberty interest which would invoke the Due Process Clause, for his deprivations were not significantly different from those customarily imposed on other prisoners. Likewise, given the standard established in Sandin, the L.R.A.A. does not create a liberty interest for the purposes of ensuring an inmate due process protection in instances of administrative segregation or transfers.

2. Plaintiff's Cruel and Unusual Punishment Claim

Brown claims that his Eighth Amendment rights were violated because the delay in providing him dental treatment constituted cruel and unusual punishment.

Brown complained of severe tooth pain and requested to see a dentist. Upon initial examination, he was given medication to relieve the pain, but did not receive an appointment after repeatedly requesting one once his medication was gone. He claims that the medical staff was deliberately indifferent to his pain, as evidenced by their delay in providing him examinations and treatment. According to the record, however, Brown received several appointments with the medical staff in which he was given medication, had a filling replaced, and eventually had the tooth removed. In addition, defendants claim that any delays in medical attention were caused by the absence of Brown's medical filea.

According to Estelle v. Gamble, 429 U.S. 97, 104 (1976), prison officials must be deliberately indifferent to an inmate's "serious medical needs" to violate the Eighth Amendment. In Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1988), the court noted that dental care was "one of the most important medical needs of inmates" (quoting Ramos v. Lamm, 639 F.2d 559, 576 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981)) and that the Eighth Amendment required "that prisoners be provided with a system of ready access to adequate dental care." In Hunt, the court denied summary judgment by defendant where an inmate lost his dentures and suffered severe pain from multiple problems that resulted. Hunt, 865 F.2d at 199. Similarly, in this case, Brown's dental needs were the type of medical concern to which prison officials must attend.

Although Brown's dental problems constituted serious medical need, he must also show that prison personnel were deliberately indifferent to his needs in order to prove they violated his Eighth Amendment rights. The Supreme Court defined this standard in Farmer v. Brennan, 114 S. Ct. 1970 (1994). Under the Court's analysis, the official must "know[] of and disregard[] an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id., 114 S. Ct. at 1979. However, officials cannot be found to violate the Cruel and Unusual Punishment Clause if they acted reasonably. Id., 114 S. Ct. at 1983. Prison officials at Lorton knew of Brown's condition since he requested appointments and was given pain medication for a period of time. However, there are genuine issues of material fact in dispute concerning the reasons for the delay in Brown's treatment. For instance, it is a question of fact whether medical staff acted reasonably in treating Brown given the administrative

difficulties in attending to the medical needs of all the prisoners or whether they were deliberately indifferent to his suffering. Accordingly, the court cannot render summary judgment on Brown's Eighth Amendment claim.

3. Plaintiff's First Amendment, Freedom of Religion Claim

Brown's final claim is that defendants prohibited him from participating in Jum'ah services when he was confined to administrative segregation. Although prisoners in confinement were prevented from attending any religious services, regardless of their faith, they had the opportunity to worship in their cells, read religious material, and talk to a spiritual advisor. Brown alleges that this prohibition interfered with his ability to practice his faith; consequently, he claims that this regulation violated the First Amendment.

If a prison regulation is "reasonably related to legitimate penological interests," then it is constitutional. Turner v. Safely, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261 (1987). The defendants, however, did not demonstrate how the regulation that affected Brown's ability to attend Jum'ah services was reasonable in relation to the management of prisoners in administrative segregation. Therefore, plaintiff's First Amendment claim cannot be dismissed.

Upon review of the plaintiff's and defendants' motions and the oppositions and replies thereto, it is hereby ORDERED that:

1. Defendants' motion to dismiss plaintiff's due process claim is GRANTED, and it is hereby DISMISSED for failing to state a claim upon which relief can be granted, and

2. Defendants' motion to dismiss plaintiff's cruel and unusual punishment and freedom of religion claim is DENIED, and

3. Plaintiff's motion for partial summary judgment is DENIED.

/s/
Royce C. Lamberth
United States District Judge

DATE: 10-12-95

APPENDIX E

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7027 **September Term, 1997**
93cv00672

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT FILED
FEB -9 1998
CLERK

Ernest Brown,

Appellant

v.

William M. Plaut, Associate Director for Institutions of the District of Columbia Department of Corrections, et al.,

Appellees

BEFORE: Wald, Henderson and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed January 15, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Deputy Clerk

APPENDIX F

United States Court of Appeals
– FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-7027 **September Term, 1997**
93cv00672

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT FILED
FEB -9 1998
CLERK

Ernest Brown,

Appellant

v.

William M. Plaut, Associate Director for Institutions of the District of Columbia Department of Corrections, et al.,

Appellees

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Deputy Clerk

APPENDIX G

Constitutional provisions

U.S. Const. amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Regulations

D.C. Mun. Regs. tit. 28 (1987)
(Lorton Regulations Approval Act ("LRAA")(1982))

D.C. Mun. Regs. tit. 28 § 500.1 (1987)

The provisions of §§500 through 519 of this chapter shall govern disciplinary actions taken when a resident of a District correctional facility is charged with a violation of the Code of Offenses set forth in §§502 through 504 of this chapter. (LRAA Ch. 1 § 100.1 (1982))

D.C. Mun. Regs. tit. 28 § 500.2 (1987)

A resident charged with a violation of the Code of Offenses who is found to pose a clear and present danger to others, or who is a definite escape risk, may be placed in administrative segregation prior to a hearing pursuant to the provisions of §531 of this chapter. (LRAA Ch. 1 § 100.2 (1982))

D.C. Mun. Regs. tit. 28 § 500.3 (1987)

A resident charged with a violation of the Code of Offenses who is found to be in danger from a clear and present threat to that resident's safety may be placed in involuntary protective custody pursuant to the provisions of §521 of this chapter. (LRAA Ch. 1 § 100.3 (1982))

D.C. Mun. Regs. tit. 28 § 500.4 (1987)

A resident who has been charged with a violation of the Code of Offenses may request placement in voluntary protective custody pursuant to the provisions of §521 of this chapter. (LRAA Ch. 1 § 100.4 (1982))

D.C. Mun. Regs. tit. 28 § 500.5 (1987)

If an alleged violation of the Code of Offenses is referred for prosecution, both adjustment action and housing action may be taken against the resident charged with the violation. (LRAA Ch. 1 § 100.5 (1982))

D.C. Mun. Regs. tit. 28 § 500.6 (1987)

If both adjustment and housing actions are initiated against a resident for the same alleged violation of the Code of Offenses, the adjustment and housing hearings required by this chapter shall be consolidated to allow the resident to be represented by one (1) counsel at both hearings. (LRAA Ch. 1 § 100.6 (1982))

D.C. Mun. Regs. tit. 28 § 500.7 (1987)

Notwithstanding the requirements of this chapter, a resident who has been found to have committed a Class III (minor) offense by a Department employee may be subject to any of the following actions without a hearing or written record:
(a) Reprimand and warning;
(b) Restitution, where appropriate; and
(c) Confiscation, where appropriate.
(LRAA Ch. 1 § 100.7 (1982))

D.C. Mun. Regs. tit. 28 § 500.8 (1987)

Whenever an offense is charged, the accused shall be accorded all of the procedural safeguards provided in this chapter. (LRAA Ch. 1 § 100.8 (1982))

D.C. Mun. Regs. tit. 28 § 502.4 (1987)

The Class I offense of **assault** shall be defined as follows:
(a) Willfully causing serious bodily injury to any person;
(b) Shooting, stabbing, or cutting another person, or willfully causing bodily injury to another person with a weapon or by any means; or
(c) Forcibly assaulting, resisting, opposing, impeding, or interfering with any correctional official or other employee of the District. (LRAA Ch. 1 § 102.8 (1982))

D.C. Mun. Regs. tit. 28 § 503.2 (1987)

The Class II offense of **bodily injury** shall be defined as willfully subjecting any person to injury or offensive bodily contact. (LRAA Ch. 1 § 103.2 (1982))

D.C. Mun. Regs. tit. 28 § 505.2 (1987)

A resident who is found guilty of a violation of any Class II (major) offense, as set forth in §503, shall be subject to the imposition of any of the following penalties and to any penalty set forth in §505.3 for Class III (minor) offenses:
(a) Forfeiture of all or part of earned good time;
(b) Change in custody status or housing assignment;
(c) Assignment to adjustment segregation, as defined in §505.5, for a period not to exceed
fourteen (14) days;
(d) Loss of pay, reduction in grade, or change of work assignment; Provided, that this punishment shall only be imposed when the offense was committed in the performance of a work assignment;
(e) Transfer to Maximum Security status; or
(f) Extra duty assignment to be performed in the resident's off-duty time from the resident's regular work assignment. (LRAA Ch. 1 § 105.2 (1982))

D.C. Mun. Regs. tit. 28 § 520.2 (1987)

A resident who has been found to pose a clear and present danger to the safety of others shall be subject to placement in administrative segregation. (LRAA Ch. 2 § 200.2 (1982))

D.C. Mun. Regs. tit. 28 § 520.3 (1987)

A resident who is found to be a definite escape risk shall be subject to administrative segregation. (LRAA Ch. 2 § 200.3 (1982))

D.C. Mun. Regs. tit. 28 § 520.4 (1987)

A resident who is found to be in danger from a clear and present threat to the resident's safety shall be subject to placement in involuntary protective custody. (LRAA Ch. 2 § 200.4 (1982))

D.C. Mun. Regs. tit. 28 § 521.3 (1987)

Administrative segregation shall also include restrictive confinement of a prisoner in any cell of the maximum security facility, or in a control cell of the central facility, or in a control cell at Youth Center II, or in the protective custody unit of Youth Center I, or in the adjustment unit of Youth Center I. (LRAA Ch. 2 § 201.8 (1982))

D.C. Mun. Regs. tit. 28 § 521.4 (1987)

Before a resident is placed in any cell of the maximum security facility, or in a control cell of the central facility, or a control center at Youth Center II, there shall be a finding made that:

(a) There is a clear and present threat to the safety of the resident;
(b) The resident poses a clear and present threat to the safety of others; or
(c) The resident poses a definite escape risk.
(LRAA Ch. 2 § 201.9 (1982))

D.C. Mun. Regs. tit. 28 § 521.7 (1987)

No resident shall be held in administrative segregation for more than three (3) days without a hearing, except as specifically provided in this chapter.
(LRAA Ch. 2 § 201.2 (1982))

D.C. Mun. Regs. tit. 28 § 521.12 (1987)

If a resident in voluntary protective custody provides the Department with a written statement that the resident no longer wishes to remain in protective custody, the resident shall be released at once from protective custody; Provided, that a resident who requests release may be placed in involuntary protective custody under the provisions of this chapter for involuntary placement in protective custody.
(LRAA Ch. 2 § 201.7 (1982))

D.C. Mun. Regs. tit. 28 § 526.1 (1987)

If, after a hearing, the Board determines that the resident should be placed in segregation, the Board shall prepare, within three (3) working days of the hearing, a written statement containing the Board's decision and the factual information upon which the decision is based.
(LRAA Ch. 2 § 206.1 (1982))

D.C. Mun. Regs. tit. 28 § 531.10 (1987)

Except in the case of riot or other major disturbance, the only circumstances in which a resident may be held in segregation for more than three (3) working days prior to a hearing is if the resident requests a continuance of the date of the hearing. In this circumstance, the resident's segregation may continue up to and include the date of the hearing.
(LRAA Ch. 2 § 211.10 (1982))

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERNEST BROWN #00013 2222 Constitution Way No. Las Vegas, NV 89030 702/657-2379, Plaintiff, v. DISTRICT OF COLUMBIA Hon. Marion Barry, Mayor 1350 Pennsylvania Avenue, N.W. Washington, D.C. 20004 202/727-6319 BERNARD L. BRAXTON Former Administrator Occoquan Facility D.C. Department of Corrections P.O. Box 85 Lorton, VA 22199 703/643-1491	)	Civ. A. No. 93-0672 (RCL)

D. PULLEN)
Asst. Administrator,)
Occoquan Facility)
D.C. Department of Corrections)
P.O. Box 85)
Lorton, VA 22199)
703/643-1491)
)
JOHN W. LATTIMORE)
Former Administrator)
Maximum Security Facility)
D.C. Department of Corrections)
P.O. Box 5200)
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)
WILLIAM SCHROEDER)
Former Unit Manager)
Maximum Security Facility)
D.C. Department of Corrections)
P.O. Box 5200)
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)
DELE OMINIJO)
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)

DR. JOHN HAMILTON)
Dentist)
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)
DR. NOEL TAIT)
Dentist)
Maximum Security Facility)
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)
SGT ARRALEAN ELLIS)
Chair, Occoquan Facility)
Housing Board)
D.C. Department of Corrections)
P.O. Box 85)
Lorton, VA 22199)
703/643-1491,)
Defendants.)
)

SECOND AMENDED COMPLAINT FOR DAMAGES AND RECORD EXPUNGEMENT (Fifth Amendment and District of Columbia law: Restrictive Prison Confinement in Violation of Due Process and Prison Rules; Eighth Amendment: Deliberate Indifference to Need for Dental Examination and Treatment; First Amendment: Violation of Right to Practice Religion)

Jurisdiction

1. The Court has jurisdiction under 28 U.S.C. §§1331, 1343(a)(3) and (4), and 1367.

Parties

2. Plaintiff Brown at all relevant times was a convicted prisoner of the District of Columbia who was housed at the District's Occoquan or Maximum Security Facilities, Lorton, Virginia.

3. Defendant District of Columbia was at all relevant times the employer of each of the individual defendants. The District of Columbia is responsible for constitutional violations caused either by District of Columbia customs, policies, or practices, or by acts of District of Columbia officials in exercise of delegated policymaking authority. Under the doctrine of *respondeat superior* the District of Columbia is responsible for violations of District of Columbia law committed by District employees acting within the scope of their employment.

4. Defendant Braxton was at all relevant times the Administrator of the Occoquan Facility of the D.C. Department of Corrections. He is responsible for his violations of District of Columbia law and for violations of clearly established constitutional law committed or approved by him or caused by his deliberate indifference. He acted under color of law and within the scope of his employment as to all of his relevant conduct. He is sued in his individual capacity.

5. Defendant Pullen was at all relevant times the Assistant Administrator of the Occoquan Facility of the D.C. Department of Corrections. He is responsible for his

violations of District of Columbia law and for violations of clearly established constitutional law committed or approved by him or caused by his deliberate indifference. He acted under color of law and within the scope of his employment as to all of his relevant conduct. He is sued in his individual capacity.

6. Defendant Ellis was at all relevant times the correctional officer appointed by Administrator Braxton to serve as the Chair of the Housing Board of the Occoquan Facility of the D.C. Department of Corrections. She is responsible for her violations of District of Columbia law and for her violations of clearly established constitutional law. She acted under color of law and within the scope of her employment as to all of her relevant conduct. She is sued in her individual capacity.

7. Defendant Lattimore was at all relevant times the Administrator of the Maximum Security Facility of the D.C. Department of Corrections. He is responsible for violations of clearly established constitutional law committed or approved by him or caused by his deliberate indifference. He acted under color of law as to all of his relevant conduct. He is sued in his individual capacity.

8. Defendant Schroeder was at all relevant times the Unit Manager of Cell Block 3 of the Maximum Security Facility of the D.C. Department of Corrections. He is responsible for his violations of District of Columbia law and for his violations of clearly established constitutional law. He acted under color of law and within the scope of his employment as to all of his relevant conduct. He is sued in his individual capacity.

9. Defendant Ominijo was Mr. Brown's case manager and Mr. Schroeder's assistant during Mr. Brown's placement in Cell Block 3 of the Maximum Security Facility of the D.C.

Department of Corrections. He is responsible for his violations of clearly established constitutional law. He acted within the scope of his employment as to all of his relevant conduct. He is sued in his individual capacity.

10. Defendant Hamilton was at all relevant times a dentist at the Maximum Security Facility of the D.C. Department of Corrections. He is responsible for his violations of clearly established constitutional law. He acted under color of law as to all of his relevant conduct. He is sued in his individual capacity.

11. Defendant Tait was at all relevant times a dentist at the Maximum Security Facility of the D.C. Department of Corrections. He is responsible for his violations of clearly established constitutional law. He acted under color of law as to all of his relevant conduct. He is sued in his individual capacity.

Facts

Assault Finding and Resulting Transfer to Maximum Security

12. On October 12, 1992 at the Occoquan Facility, where Mr. Brown was housed, correctional officer Corporal C. Parks prepared a Disciplinary Report (DR) charging Mr. Brown with having committed two offenses that day: (1) Bodily Injury, under § 103.2 of the Lorton Regulations Approval Act of 1982 (LRAA), for throwing "an unknown substance" on Cpl. Parks; and (2) Threatening Conduct, under § 103.10(a)(1) of the LRAA, for saying "I'm still going to get you."

13. On October 13, 1992 Lt. Larry Corbett gave Mr. Brown a memorandum notifying Mr. Brown that an

Adjustment Board hearing would be held October 16 on Cpl. Parks's charge of Threatening Conduct. The memorandum did not mention a charge of Bodily Injury. At no time did Mr. Brown receive notice of an Adjustment Board hearing, or of any hearing, on a charge of Bodily Injury. On October 13, Mr. Brown was taken to the Maximum Security Facility.

14. On October 15, 1992 defendant Ellis came to Maximum Security Facility with two other Occoquan officers. They conducted a Housing Hearing regarding Mr. Brown. Defendant Schroeder attended the hearing. Mr. Brown received no advance written notice that this hearing would be held or of the charges which would be heard. Defendant Ellis knew that Mr. Brown had received no advance written notice of this hearing. Defendant Ellis prepared and signed a memorandum to Mr. Brown dated October 15, 1992 entitled Notice of Housing Hearing. This memorandum said "[t]his serves to notify you that you are scheduled to appear before the Housing Board at Occoquan Facility on October 16, 1992, within the Adjustment Unit." The memorandum had a line intended to be marked by Mr. Brown to indicate his waiver of three-day notice of the Housing Hearing. The memorandum also had a line for Mr. Brown's signature. Mr. Brown never received this memorandum before, or even during, the October 15 Housing Hearing. Mr. Brown never marked nor signed this memorandum. (Mr. Brown did not see this memorandum until he obtained a copy of it about December 1992 in response to a Freedom of Information Act request.)

15. On October 15, 1992 defendant Ellis and the other two members of the Housing Board signed a Housing Board Action Sheet indicating that a hearing had been held that date regarding Mr. Brown. In pertinent part, the Action Sheet said the reason for the October 15 hearing was "the alleged incident involving staff on October 12, 1992." In the section

of the Action Sheet recording the Board's findings and recommendations, the Board wrote:

> The Housing Board finds Resident Brown to be a threat to self and others due to the alleged incident involving correctional staff. The Housing Board recommends that Resident Brown is transferred to Maximum Security. Resident Brown has signed Non-Animosity and Waiver of Protective Custody forms. The Housing Board recommends that his custody level be changed from medium to maximum. Resident Brown assaulted Cpl. Parks.

The Housing Board's October 15 Action Sheet included no written findings of the evidence that "Resident Brown assaulted Cpl. Parks." Mr. Brown never signed the Waiver of Protective Custody form mentioned in the Action Sheet. Mr. Brown did not see this Action Sheet until he obtained a copy of it about December 1992 in response to a Freedom of Information Act request.

16. At no time before the October 15, 1992 Housing Hearing had Mr. Brown received written notice either of a charge, or of a hearing on a charge, that he had "assaulted Cpl. Parks." Defendant Ellis's October 15 Notice of Housing Hearing, even if it had been given to Mr. Brown before the October 15 hearing, would not have afforded him advance notice of a hearing on whether he had assaulted Cpl. Parks. Defendant Ellis's October 15 Notice made no allegation of any conduct by Mr. Brown. Nor did this Notice identify any of the purposes for the hearing listed in § 203.3 of the LRAA.

17. The Adjustment Board Hearing scheduled for October 16 was never held. No Adjustment Board Hearing was ever held on either of the charges stated in Cpl. Parks's October 12

Disciplinary Report. The proposed October 16 Housing Hearing at Occoquan, mentioned in defendant Ellis's October 15 Notice, was never held.

18. On October 20, 1992, defendent Schroeder and defendant Pullen, the latter acting for defendant Braxton, approved the Housing Board's October 15 findings and recommendations. On November 7, 1992 defendant Braxton personally ratified the October 15 Housing Board decision.

19. As a result of the October 15 Housing Board decision, Mr. Brown was transferred from his Occoquan dormitory to restrictive confinement in a cell of the Maximum Security Facility, under the stigma of the finding that he "assaulted Cpl. Parks." Under LRAA § 201.3, the transfer authorized prison officials to place Mr. Brown in solitary confinement, except for opportunity to walk by himself in a short hallway in front of his cell for two hours each week, and visits limited to one hour per day while handcuffed, leg-shackled, and belly-chained. Mr. Brown was confined in these circumstances for four months in Cellblock 3. He was confined for more than six months thereafter in Cellblock 4, in circumstances only slightly less restrictive than those in Cellblock 3--solitary confinement to a cell for 21 to 22 hours each day, release at other times with other prisoners to a small television room, or a small outdoor courtyard, or a trailer once each week for religious services. Mr. Brown's confinement in Cellblocks 3 and 4 precluded him from participating in any educational or rehabilitative program. His confinement in Cellblocks 3 and 4 was significantly more restrictive than his housing as a medium custody prisoner at Occoquan, where he lived with other prisoners in a dormitory and never was subjected to handcuffs, shackles, or chains. At Occoquan Mr. Brown was allowed daily access with other prisoners to the outside recreation yard, between 8 a.m. and dusk; the inside gymnasium or a large sports field, for one to three hours; the

law library, for five hours (except weekends); telephones, from 8 a.m. to 11 p.m.; and all areas inside the dormitory, including the showers and game and television room, at any time of the day or night. Mr. Brown was allowed to worship with 60-100 other Muslims at the Masjid, between 9 a.m. and 10 p.m. As First Emir, Mr. Brown taught religion classes almost every day. He enrolled in the University of the District of Columbia, and took 30 credits in the undergraduate curriculum in English, math, and sociology. He placed his name on the waiting list for a substance abuse rehabilitation program. As a result of the assault finding and transfer to Maximum Security, Mr. Brown suffered lengthy and severe loss of liberty and opportunity for self-improvement, damage to his reputation, and mental and emotional distress.

20. In January 1993 Mr. Brown became eligible for his first consideration for parole. On June 4, 1993, several months late, Administrator Lattimore sent a memorandum to the Parole Board recommending that Mr. Brown be denied parole. The documents accompanying Mr. Lattimore's memorandum said the recommendation was based on Mr. Brown having a Salient Factor Score (SFS) of 3. This score was reduced one point for "Program Achievement," but then increased one point for "Negative Institutional Behavior," resulting in a Point Assignment Grid (PAG) score of 3. For prisoners with a PAG score of 3-5, the D.C. Board of Parole Point Assignment Grid states "Parole shall be denied at initial hearing and rehearing scheduled." Regarding Mr. Brown's institutional behavior, a document accompanying Mr. Lattimore's memorandum stated that Mr. Brown's custody had been changed from Medium to Maximum as a result of his having committed an Assault on October 12, 1992. This document also said that Mr. Brown should participate in a substance abuse program, but noted that such a program was "Not available at Maximum Security Facility."

21. On August 17, 1993 the Parole Board denied Mr. Brown parole. The Board calculated the same PAG score as the documents accompanying Mr. Lattimore's memorandum. The Board said that Mr. Brown's "adjustment has been poor he has received two Class II DRs and has been charged with assault." The Board's decision also stated that Mr. Brown should complete a substance abuse program before parole reconsideration.

22. Had Mr. Brown's PAG score not included a point for "Negative Institutional Behavior," his score would have been 2. For prisoners with a score of 2, the D.C. Board of Parole Point Assignment Grid states "Parole shall be granted at initial hearing." The Parole Board's finding of "Negative Institutional Behavior" was substantially motivated by Mr. Brown's transfer to Maximum Security under the stigma of the assault finding and increase in custody level. Also, had Mr. Brown not been transferred to the Maximum Security Facility he would not have been precluded from completing a substance abuse program prior to his initial parole consideration. The August 1993 denial of parole was substantially motivated by the assault finding, transfer to Maximum Security, and increase in custody level. As a result of the denial of parole Mr. Brown suffered a six-month increase in the length of his incarceration as well as additional mental and emotional distress.

Delay in Affording Dental Clinic Examination and Treatment

23. On about October 23, 1992 Mr. Brown, then housed in Cell Block 3 of the Maximum Security Facility, signed the dental sick call list, indicating his need to see a dentist. Thereafter, Mr. Brown signed the dental sick call list either once or twice a week. In notations he made next his name, he indicated that he was suffering severe pain. Daily cell block

circulation and delivery of the dental sick call list to defendants Hamilton and Tait was at all relevant times the routine practice of Maximum Security Facility.

24. Mr. Brown received no dental examination or treatment until November 18, 1992, nearly a month after he first signed the dental sick call list. On November 18 defendant Hamilton saw Mr. Brown in his cell in Cell Block 3. Dr. Hamilton saw tooth decay and gum inflammation. Dr. Hamilton's assessment of tooth #31 said "possible recurrent decay . . . acute irreversible . . . possible . . . abscess." Dr. Hamilton prescribed penicillin and 800 mg - strength Motrin. He wrote, "Schedule for clinic." Dr. Hamilton told Mr. Brown that he "would be seen for sure" the following week.

25. Mr. Brown received no dental examination or treatment the following week. On December 1, 1992 Mr. Brown wrote an IGP grievance to defendant Lattimore saying that he had signed the dental sick call list in October, that his tooth pain had become intolerable, that he had not been seen by a dentist until November 18, that he was suffering chronic pain, and that he had not seen a dentist since November 18. On December 2, 1992 Mr. Brown spoke with defendant Schroeder about his need to see a dentist. Defendant Schroeder told Mr. Brown that he would be seen by a dentist soon. On December 3, 1992 Mr. Brown told defendant Lattimore that he had a painful tooth and needed to see the dentist. Mr. Lattimore told Mr. Brown that he would be seen by a dentist within a week.

26. On December 11, 1992 Mr. Brown saw defendant Tait. Dr. Tait said Mr. Brown needed a medical examination before he would treat Mr. Brown's dental condition.
On December 14, 1992, Dr. Salazaar performed a medical examination of Mr. Brown. Then, in Mr. Brown's presence, Dr. Salazaar called Dr. Tait and informed Dr. Tait that he had

completed his medical examination of Mr. Brown. Dr. Salazaar told Dr. Tait that the results were negative, meaning that there was no medical condition that would preclude dental treatment. Dr. Tait then said he had Mr. Brown on his list and that he would get to him. Dr. Salazaar told Mr. Brown that Dr. Tait had said this.

27. On December 31, 1992 defendant Lattimore's office responded to Mr. Brown's December 1 IGP grievance. The response said, "You are scheduled to be seen the week of January 3, 1993."

28. Mr. Brown received no dental examination or treatment the week of January 3, 1993. Nor did he receive dental examination or treatment at any time in January 1993. On January 30, 1993 Mr. Brown wrote another IGP grievance to defendant Lattimore. He said he had a "severe dental problem," that had not been treated, and that he was in pain.

29. On February 5, 1994 Dr. Tait saw Mr. Brown in his cell in Cell Block 3. He found "sensitivity" and inflamed gums. Dr. Tait prescribed penicillin and 800 mg-strength ibuprofen. Regarding tooth #31 he noted, "Restoration present." He wrote that Mr. Brown needed dental "Examination/Consultation." This, essentially, is what Dr. Hamilton had written over eleven weeks earlier, on November 18, 1992.

30. Mr. Brown received no further dental examination or treatment until February 25, 1993. On that day, in the dental clinic, Dr. Tait found that the filling in tooth #31 was defective. He replaced the filling. Mr. Brown continued to experience severe pain, causing loss of sleep. On March 9, 1993 Dr. Tait extracted tooth #31.

31. As a result of the delay in effectively treating tooth #31, Mr. Brown suffered severe pain for many weeks, loss of sleep, and mental and emotional distress.

Denial of Participation in Jum'ah Prayer Services

32. Mr. Brown is a Muslim. His religion requires that he gather with other Muslims every Friday afternoon for Jum'ah Prayer Service. Conduct of the Service requires that one of those present--usually the person most experienced or knowledgeable regarding the Service--address the others.

33. By memorandum to Administrator Lattimore dated October 26, 1992, Chaplain Willie Ceasar Jr. requested that Mr. Lattimore approve the holding of Jum'ah Prayer Services in Cell Block 3, where Mr. Brown was housed. Chaplain Ceasar's memorandum stated:

> I am requesting that the members of the Sunni Community that are housed in Cellblocks One, Three, and Five be allowed to participate in Jum'ah Prayer Service every Friday from 2:00 p.m. 3:00 p.m. The Prayer services will be held in the respective Conference Rooms.

On November 2, 1992, Mr. Lattimore approved Chaplain Ceasar's request.

34. Shortly after Mr. Lattimore's approval of Chaplain Ceasar's October 26 request, a Muslim prisoner working in Cell Block 3 as a "detail man" informed Mr. Brown of the memorandum approving Jum'ah services in the cell block. This prisoner told Mr. Brown there were other Muslim prisoners in the cell block who would like to gather for Friday services. He asked Mr. Brown if he would lead the services.

35. Mr. Brown repeatedly asked defendants Schroeder and Ominijo to implement the memorandum allowing Jum'ah services. Neither did so. Mr. Brown wrote defendant Lattimore three times in November 1992, each time requesting that the memorandum allowing Jum'ah services be implemented. Mr. Brown received no response to any of these letters. On January 25, 1993 Mr. Brown submitted to defendant Lattimore an IGP grievance (mistakenly dated 1-25-92) saying that he had made several attempts through defendants Schroeder and Ominijo to obtain implementation of the memorandum allowing Jum'ah services, but that neither defendant Schroeder nor defendant Ominijo had answered his requests. Mr. Brown received no response to his IGP.

36. Mr. Brown was housed in Cell Block 3 for three and one-half months after defendant Lattimore's November 2, 1992 approval of Jum'ah services. At no time during this period was Mr. Brown allowed to attend Jum'ah services. As a result of this denial, Mr. Brown suffered mental and emotional distress.

Claims

Violation of Due Process and Rules Governing Housing Decisions

37. As the facts stated in ¶¶ 19-22 show, transfer of a medium custody prisoner from dormitory housing at Occoquan to restrictive, maximum custody confinement in a Maximum Security Facility cell, based on a finding of assault on an officer, is a significant deprivation of liberty likely to adversely affect consideration for parole. A transfer of this kind, which under the LRAA constitutes either administrative or disciplinary segregation, is also an atypical deprivation, one which prison authorities do not have unfettered discretion to impose. Under District of Columbia law, prisoners have a

right to be properly classified as minimum, medium, or maximum custody prisoners, *Verrett v. Stempson*, 623 A.2d 120 (D.C. 1993); and they may be removed from the general prison population and placed in restrictive confinement in a Maximum Security Facility cell only if factual information shows that a "clear and present threat" to the prisoner's safety exists, that the prisoner is a "definite escape risk," that the prisoner poses a "clear and present danger to the safety of others," or that the prisoner has committed a specific disciplinary offense. LRAA §§ 100, 200, 206.1. Under law clearly established before October 1992, Mr. Brown therefore had a liberty interest against transfer from his Occoquan dormitory to restrictive confinement in a Maximum Security Facility cell, and Fifth Amendment due process required both (a) that Mr. Brown be provided written notice of the assault accusation that subjected him transfer, no less than 24 hours before the October 15, 1992 Housing Board hearing on that charge; and (b) that the October 15, 1992 Housing Board decision that transferred him include written findings of the evidence relied on to sustain the assault charge. It is apparent on the face of the written record that both of these due process requirements were violated by the October 15, 1992 Housing Board decision. Since defendant Ellis recommended, and defendants Schroeder, Pullen, and Braxton approved this decision, each of these defendants is liable to Mr. Brown under 42 U.S.C. § 1983 for the injury caused by these due process violations.

38. Under 42 U. S.C. §1983 the District of Columbia is liable to Mr. Brown for the injury caused by these procedural due process violations because

(a) the violations are apparent on the face of the written record and the Board's decision was approved by Administrator Braxton, who, in doing so, exercised both final authority to approve or disapprove Housing Board decisions,

as well as D.C. policymaking authority to determine whether written statements of the factual information on which Housing Board decisions are based must include statement of the evidence relied on by the Board; and

(b) the Housing Board's failure to make the required written evidentiary findings was caused by the District of Columbia's custom, policy, and practice of not requiring such findings.

39. The Housing Board's October 15, 1992 decision also violated Mr. Brown's right under § 203 of the Lorton Regulations Approval Act of 1982 (LRAA) to three-days' advance written notice of the time and purpose of Housing Board hearings. This violation is apparent on the face of the written record and was prejudicial because it deprived Mr. Brown of both opportunity to prepare his defense and his right under LRAA §§ 203 and 204 to prepare and present his defense with assistance of counsel. Defendants Ellis, Schroeder, Pullen, Braxton, and, under the doctrine of *respondeat superior*, District of Columbia are liable to Mr. Brown for this violation of the LRAA.

Deliberate Indifference to Serious Dental Need

40. Mr. Brown's need for examination and treatment, in the dental clinic, of his painful problem with tooth #31 was a serious medical need. Mr. Brown notified defendants Hamilton and Tait in late October 1992 of his dental pain and possible need for dental clinic examination and treatment. Defendants' failure until November 18, 1992 to see Mr. Brown constituted deliberate indifference to this possible need. On November 18, 1992 defendant Hamilton determined that the condition of tooth #31 possibly was acute and irreversible and that Mr. Brown needed to be examined in the dental clinic. Defendants' three month delay, until February

25, 1993, in affording the necessary dental clinic examination constituted deliberate indifference to this serious medical need. Under Eighth Amendment law clearly established before October 1992 and 42 U.S.C. § 1983 defendants Hamilton and Tait are liable to Mr. Brown for the injury caused by this deliberate indifference.

41. The District of Columbia is liable under § 1983 for the injury caused by this deliberate indifference because

(a) the District delegated to Drs. Tait and Hamilton policymaking authority to determine when Maximum Security prisoners who assert dental needs would be seen by them, and when Maximum Security prisoners found to need dental clinic examination would be afforded this examination; and the delays by Drs. Tait and Hamilton in seeing Mr. Brown in the cell block and in examining him in the dental clinic resulted from their exercise of this policymaking authority; and

(b) the delays by Drs. Tait and Hamilton in seeing Mr. Brown in the cell block and in examining him in the dental clinic were caused by D.C. prison dentists' widespread custom and practice of lengthy delay in seeing and examining prisoners with asserted and actual dental needs--a custom and practice to which the District has been, and still is, deliberately indifferent.

Violation of Right to Attend Jum'ah Services

42. Since Mr. Lattimore on November 2, 1992 expressly approved the holding of Jum'ah services in Cell Block 3 of the Maximum Security Facility, the knowing failure by him and defendants Schroeder, and Ominijo to permit Mr. Brown to attend Jum'ah services in Cell Block 3 after November 2 was not reasonably related to any legitimate penological purpose.

This knowing failure constituted deliberate indifference to Mr. Brown's First Amendment right to practice his religion, a right which was clearly established in law as of November 2, 1992. Under 42 U. S.C. §1983 defendants Lattimore, Schroeder, and Ominijo are liable to Mr. Brown for the injury caused by their First Amendment violation.

43. The District of Columbia is liable under § 1983 for the injury caused by the First Amendment violation because the District delegated to Administrator Lattimore policymaking authority to determine the times, places, and circumstances in which Maximum Security prisoners would be permitted to meet for religious activities; and defendant Lattimore's knowing failure to permit Mr. Brown to attend Jum'ah services in Cell Block 3 after November 2 resulted from his exercise of this policymaking authority.

Relief

44. Plaintiff asks the Court to

(a) hold defendants Ellis, Schroeder, Pullen, Braxton, and District of Columbia jointly and severally liable to Mr. Brown for compensatory damages and his costs and reasonable attorneys' fees for the due process and LRAA violations resulting from the October 15, 1992 Housing Board decision;

(b) hold defendant Ellis liable to Mr. Brown for punitive damages for denying Mr. Brown advance written notice of the October 15, 1992 Housing Hearing and the assault charge determined at that hearing, in violation of due process and the LRAA;

(c) order defendant District of Columbia to expunge from its records the October 15, 1992 Housing

Board decision, the August 1993 Parole Board decision, and all documents pertaining to either of these decisions;

(d) hold defendants Hamilton, Tait, and District of Columbia jointly and severally liable to Mr. Brown for compensatory damages and his costs and reasonable attorneys' fees for deliberate indifference to his serious dental need, in violation of the Eighth Amendment;

(e) hold defendants Lattimore, Schroeder, Ominijo, and District of Columbia jointly and severally liable to Mr. Brown for compensatory damages and his costs and reasonable attorneys' fees for violation of his First Amendment right to practice his religion;

(f) hold defendants Lattimore, Schroeder, and Ominijo liable to Mr. Brown for punitive damages for violation of his First Amendment right to practice his religion;

(g) afford such further or alternative relief as the Court deems just.

Jury Demand

On his claims for damages, Mr. Brown demands a jury trial.

Respectfully submitted,
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